In the Supreme Court of the United States.

OCTOBER TERM, 1921.

UNITED STATES OF AMERICA, PETITIONER,
v.
FREDERICK L. MERRIAM, RESPONDENT. } No. —.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

The Solicitor General on behalf of the United States of America prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit reversing a judgment heretofore rendered by the District Court of the United States for the Southern District of New York in favor of the United States and against Frederick L. Merriam.

STATEMENT OF THE CASE.

This is an action by the United States of America, hereinafter referred to as the plaintiff, against Frederick L. Merriam, hereinafter referred to as the defendant, for the recovery of $10,912.26, with penalty and interest, on account of additional income tax for the year 1915 under the provisions of the act

of October 3, 1913. The defendant is one of the executors of and trustees under the last will and testament of Alfred G. Vanderbilt, deceased. The sole question involved is whether a bequest in the sum of $250,000, expressly stated by the testator to have been made "in lieu of all compensation or commissions" to which defendant would otherwise be entitled as executor or trustee and received by the defendant during the year 1915, constituted taxable income within the meaning of the act of October 3, 1913.

The District Court overruled the demurrer to the amended complaint and held that the bequest in question was compensation fixed by the testator in lieu of the statutory compensation. The Circuit Court of Appeals for the Second Circuit upon writ of error to the District Court reversed the judgment of the District Court.

SECTION OF THE STATUTE INVOLVED.

Section II of the act of October 3, 1913 (38 Stat. 114–166), provides:

> A. Subdivision 1. That there shall be levied, assessed, collected, and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year to every citizen of the United States, * * * a tax of 1 per centum per annum * * *.
>
> B. That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income derived from salaries,

wages, or compensation for personal service of whatever kind and in whatever form paid, * * * or gains or profits and income derived from any source whatever, including the income from but not the value of property acquired by gift, bequest, devise, or descent.

REASONS FOR GRANTING PETITION.

1. The court erred in holding that the bequest to the defendant was not compensation for the services to be rendered by him as executor and trustee.

2. The court erred in holding that the bequest to the defendant was not taxable income within the meaning of the act.

3. The question is of importance not only by reason of the fact that it is determinative of a number of income tax cases pending in the courts, but also by reason of the fact that the ruling affects all of the revenue acts where the substance of the provision in question has been retained.

BRIEF IN SUPPORT OF PETITION.

It is well settled by many decisions in this country that a bequest to an executor "in lieu of commissions" constitutes a testamentary fixing of the compensation to be paid the executor for the work, labor, and services to be performed by him.

Fletcher v. *Hurd*, 14 N. Y. Supplement, 388.
Matter of Accounting of Mason, 98 N. Y. 527.
Matter of Tilden, 44 Hun. 441.
Matter of Vanderbilt, 68 App. Div. 27.
Renshaw v. *Williams*, 75 Md. 498.

Sinnott v. *Kenaday*, 14 A. C. (D. C.) 1, 24.
In re Sweatman's Estate, 223 Pa. 552.
(Reversed on other grounds 179 U. S. 696.)

In *Fletcher* v. *Hurd* (14 N. Y. Supplement, 388) the court held that a bequest of the residue to executors "to be divided equally between them *in lieu of compensation* for their services in the execution of their trust" was intended as compensation and that a person designated as executor who failed to qualify was not entitled to share in the bequest. To hold otherwise, the court said, would "convert a bequest in compensation for services into an absolute individual gift."

In the *Matter of Accounting of Mason* (98 N. Y. 527) the Court of Appeals of the State of New York said respecting a bequest of the residue given to the executors without qualifying words:

> This bequest was not intended for the specific compensation mentioned in section 2737 of the code. There is no language in the will indicating that it was meant to be *in lieu of commissions*.

The very language upon the absence of which the decision in that case turned is present here.

In *Renshaw* v. *Williams* (75 Md. 498) the court said:

> There is no doubt that the legacy was given to Mr. Williams not as a gratuity, and not unconditionally, but in lieu of commissions as executor. Upon this subject the will is explicit. * * * That legacy was given as a payment for all the labor and services which

> Mr. Williams might perform in completely settling Mrs. Conine's whole personal estate. * * * where he has been bequeathed *in lieu of commissions* a larger legacy than the commissions would amount to, and does, as administrator *pendente lite*, only that which he was bound to do as executor, the legacy must be treated as a full compensation for all the labor it was intended to cover, namely, the entire administration of the whole estate.

In the case of *Sweatman's Estate* (223 Pa. 552) the testator provided in his will that each of the three executors should receive $6,000 "in lieu of all commissions." The court, in holding the personal representative of one of the executors who died before fully performing the services as such executor to be entitled to the bequest, said:

> His death did not deprive his estate of his right to *what had been earned* and it was *in lieu of* that compensation that he was given his legacy. It must be presumed * * * that the testator had in mind the possibility that death might reduce the number of his executors and that he considered such a contingency when he fixed *the compensation to be paid* to each of them.

The cases cited by the Circuit Court of Appeals in support of the conclusions reached by it are based upon the English rule which holds a fiduciary office to be an honorary one and requires the incumbent to serve gratuitously. This rule obtained in this country until changed by statute. (See *Manning* v.

Manning, 1 Johnson's, Ch. 527.) In practically every State of the United States, however, including New York, compensation is now provided by statute for executors, trustees, and other fiduciaries. The reason for the rule thus fails, and with it the rule itself.

In providing that the value of property acquired by bequest should not be included in net income, Congress did not intend to exempt from taxation compensation for personal services paid in the form of a bequest. This appears from the express language of the act, including in its definition of income "compensation for personal service of whatever kind and *in whatever form paid*." There is to be found in the clause in question no legislative intent to exclude from taxation bequests given as compensation for services rendered or to be rendered.

Furthermore, it is settled that in its general acceptation "bequest" denotes a bounty or gratuity and not payment. In *Reynolds* v. *Robinson* (82 N. Y. 103) the Court of Appeals said:

> A legacy implies a bounty and not a payment, and to permit extrinsic evidence of the declaration of the testator to change the material import of the donative words, would be to contradict by oral evidence the legal effect of the written instrument and would violate the policy of the statute of wills.

In *Disston et al.* v. *McClain* (147 Fed. 114) the court defined a legacy as follows:

> Legacies and distributive shares are classed together, and as a distributive share is a definite portion in money of the residue of the

> personal estate of an intestate, so a legacy is a definite *gift* by will of personal property either general and pecuniary, or specific.

That the word "bequest" was used in that sense in the act is also apparent from a reference to the words "gift" and "descent" with which it is associated in the clause in question. Contrasting the word "bequest" with the provision which defines income as including "compensation for personal service * * * *in whatever form paid*" resolves the doubt, if any exists.

Congress in providing that a "bequest" should not be included as income used the term in the sense in which it is generally understood and did no more in enacting the clause in question than point out that receipts not derived from capital or labor or both combined do not constitute income. As, under the authorities, the bequest received by the defendant is compensation fixed by the testator for the services to be rendered by the defendant as executor and trustee, it clearly constitutes taxable income, the form of payment by express mandate of Congress being immaterial.

It is, therefore, respectfully submitted that a writ of certiorari should issue and the judgment of the Circuit Court of Appeals for the Second Circuit be reviewed, to the end that it may be reversed and the judgment of the District Court reinstated.

JAMES M. BECK,
Solicitor General.

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